Supreme Court, U.S.
FILED

No. (1)

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IN THE

Supreme Court of the United States

GOVINDBHAI M. PATEL,
Petitioner

v.

MICHAEL HESTON,
DISTRICT DIRECTOR OF THE UNITED STATES
IMMIGRATION AND NATURALIZATION SERVICE
and
JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Petitioner's seven years of continuous physical presence in the United States during the period following the Order to Show Cause issued to him on April 6, 1990 constituted a "(seven year) period of continuous physical presence" to qualify him for eligibility for suspension of deportation under former section 244 of the Immigration and Nationality Act ("INA"), 8 USC §1254 (1990).

STATEMENT OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the Eighth Circuit Court of Appeals.

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Regardless whether the issuance of the Order to Show Cause terminated the period of continuous physical presence begun when Petitioner entered the United States, Petitioner accrued a new period of continuous physical presence in excess of seven years after the issuance of the Order to Show Cause. This period of physical presence qualifies Mr. Patel for suspension of deportation.

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PETITION FOR WRIT OF CERTIORARI

Govindbhai M. Patel, the petitioner, respectfully prays that a writ of certiorari issue to review the opinoin and order of the United States Court of Appeals for the Eighth Circuit entered in this case on November 22, 2000 and February 15, 2001, respectively.

OPINIONS BELOW

The opinion of the Board of Immigration Appeals (App.B hereto) is unreported. The opinion of the Eighth Circuit Court of Appeals on the merits (App. C hereto), which is sought hereby to be reviewed, is reported at *Patel v. I.N.S.*, 24 F.3d 376 (Table) (8th Cir. 2000). The order of the Eighth Circuit denying the petition for rehearing en banc and for panel rehearing in such case (App. D hereto) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit [Appendix C] was entered on November 22, 2000. A timely petition for rehearing en banc and for panel rehearing was denied on February 15, 2001. (Appendix D). The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(c), in that the Eighth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Also, the Eighth Circuit decision is in conflict with an analysis, albeit obiter dictum, of the Ninth Circuit. Sup.Ct. Rule 10(a).

STATUTORY PROVISIONS INVOLVED

Former Title 8, U.S.C., §1254(a) provided in pertinent part:

§1254. **Suspension of deportation**

(a) Adjustment of status for permanent residence; contents

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(4)(D) of this title) who applies to the Attorney General for suspension of deportation and–

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

(2) is deportable under paragraph (2), (3), or (4) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immedi-

> ately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; . . . .

Such provision has been repealed and replaced after this case was initiated with the INS, by Title 8, U.S.C., §1229b (d)(1) and (d)(2), which provide in pertinent part:

Section 1229b. Cancellation of removal; adjustment of status

. . .

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien -

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title; and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

. . .

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 1229(a) of this title or when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

STATEMENT OF THE CASE

(i) Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("BIA" or "Board") of the Immigration and Naturalization Service and the Eighth Circuit Court of Appeals denying Petitioner's Motion to Reopen and Reconsider his case to allow an application for suspension of deportation.

(ii) Proceedings at the Immigration and Naturalization Service

Petitioner was issued an Order to Show Cause ("OSC") by the Immigration and Naturalization Service on April 6, 1990. The OSC charged him with being deportable as an overstay. At his individual hearing on December 10, 1992, Petitioner conceded deportability and requested relief in the form of asylum, withholding of deportation and voluntary departure. The Immigration Judge denied asylum and withholding and granted Mr. Patel voluntary departure for 120 days, with an alternative order of deportation. Petitioner timely filed his appeal with the Board.

(iii) Proceedings at the Board of Immigration Appeals

Petitioner, through previous counsel, appealed to the BIA detailing allegations of error in the Immigration Judge's findings of fact and application of law concerning the denial of asylum. The Service filed its response brief detailing its arguments in support of the findings of the Immigration Judge. On December 14, 1995, Petitioner filed a motion to remand the case to consider an adjustment of status application in light of Mr. Patel being the beneficiary of an immigrant visa petition. The

Service then filed two memoranda in opposition to this motion to remand, on January 10, 1996 and July 8, 1996. Petitioner filed a reply memorandum on this issue on September 18, 1996. On September 25, 1996, the Service filed a Second additional response to Petitioner's motion to remand. Present counsel entered his appearance with the Board on behalf of Mr. Patel on November 13, 1996 and asked for a continuance of 90 days to file a petition seeking suspension of deportation. The Service opposed the continuance in a memorandum filed November 26, 1996. Petitioner on January 27, 1997 filed a Motion to Reopen and Reconsider (Remand) the case to the Immigration Judge for consideration of Petitioner's attached application for suspension of deportation. The Service then filed a response opposing this motion on February 3, 1997. Finally, on December 14, 1999, the Board upheld the Immigration Judge's decision denying asylum and withholding of deportation, denying Petitioner's motion to remand, and granting 30 days voluntary departure. Petitioner timely filed a petition for review with the Eighth Circuit Court of Appeals.

(iv) Statement of Facts

Govindbhai M. Patel is a citizen of India. He entered the United States pursuant to a lawful visitor visa on September 8, 1989 and has since resided in the United States. He has not departed the United States at any time since his arrival. He is married and has two children, one of whom is a citizen of the United States. He is a successful businessman and a valuable member of his local community. On April 6, 1990 the INS issued Mr. Patel an Order to Show Cause ("OSC") charging him with deportability, and Mr. Patel asked for political asylum. After his asylum case was denied by the Immi-

gration Judge in December 1992 and a timely appeal was filed, it took the BIA **nearly seven (7) years** to issue its decision. If Mr. Patel were to have left at any time during the pendency of this appeal, he would have "self-deported", causing him not only to abandon his appeal but also to incur a five (5) year bar to his return. Former 8 U.S.C. §1182(a)(6)(B), former INA §212(a)(6)(B) (1990).

When Mr. Patel had accrued seven (7) years of continuous physical presence in the United States after his original entry, he filed a Motion to Reopen and Reconsider (Remand) with the Board, asking for suspension of deportation. At the time he filed this motion, he was qualified for the relief requested. Instead of considering this motion promptly, the BIA took nearly another three years to decide the case. In the meantime, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") took effect, and was subsequently amended by the Nicaragua and Central American Relief Act ("NACARA") to cause an OSC to terminate a continuous period of physical presence in the U.S. for purposes of suspension of deportation (sometimes called the "stop time rule"). When the Board finally issued its decision on December 14, 1999, it ruled that Mr. Patel did not accrue seven or more years of physical presence due to the OSC issued in 1990. It did not address, however, the fact that Mr. Patel had accumulated over seven years of continuous physical presence after the issuance of the OSC and *before* the Board issued its decision. Mr. Patel filed his Petition for Review in the Court of Appeals for the Eighth Circuit on January 12, 2000. That court issued its decision on November 22, 2000, denying the appeal, ruling that his arguments involving physical presence and the stop-time rule are foreclosed by recent

decisions of that court. Mr. Patel filed a motion for rehearing en banc, which was denied on February 15, 2001.

v. Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction was proper in the Eighth Circuit Court of Appeals pursuant to §106 of the INA, 8 USC §1105(a)(1990) as amended by §309 of IIRIRA, Pub.L. 104- 208, 110 Stat. 3009. In the alternative, the Court of Appeals had jurisdiction under §242 of the INA, 8 USC §1252 (1996). Venue was proper under §106 of the INA, 8 USC §1105 (1990) as amended by §309 of IIRIRA or in the alternative under §242 of the INA in that the judicial proceedings were completed by the immigration judge sitting in St. Louis, Missouri in the Eighth Circuit.

The jurisdiction of this Court on application for a writ of certiorari is invoked under U.S. Supreme Court Rule 10(c) as set forth above. That is, the petition for certiorari will present a substantial question, for the reason that the Eighth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court. That question is whether the accrual of continuous physical presence the United States required for eligibility for suspension of deportation under 8 U.S.C. § 1254(a)(i) may begin *after* the alien is served an order to show cause. The decision by the Eighth Circuit, interpreting a recent amendment by Congress to the statutory scheme concerning deportation, threatens thousands more aliens residing in the United States with deportation. Such interpretation is not required by the language of the statutory amendment. This result

will affect not only the aliens concerned, but also their families (many of which, as in this case, include children who are U.S. citizens.)

Jurisdiction of the Supreme Court also exists because the decision of the Eighth Circuit herein is in conflict with the theory expressed by the Ninth Circuit Court of appeals, in a footnote, that the alien therein satisfies the requirement because "she has accrued [seven or more] years of physical presence **since**. . ." the show cause order. *Arrozal v. INS*, 159 F.3d 429, 434, n.2 (9th Cir. 1998) (emphasis in original). (Case decided on other grounds).

REASONS FOR GRANTING THE WRIT

Regardless whether the issuance of the Order To Show Cause terminated the period of continuous physical presence which began when Petitioner entered the United States, Petitioner accrued a new period of continuous physical presence in excess of seven years after the issuance of the OSC. This period of physical presence qualifies Mr. Patel for suspension of deportation.

The Eighth Circuit Court of Appeals denied Mr. Patel's petition based upon its own holding in *Afolayan v. INS,* 219 F.3d 784 (8th Cir. 2000). *Afolayan*, however, was decided based on faulty reliance on the holdings of the Board in *In re Mendoza-Sandino*, Int. Dec. 3426 (BIA 2000), 2000 WL 225840 (BIA) and *Matter of Nolasco*, Int. Dec. 3385 (BIA 1999). The *Nolasco* decision adverts to the fact that the issuance of an OSC may end a period of continuous physical presence acquired before then, but does not address whether an alien may accrue a *subsequent* period of continuous physical presence. *In re Mendoza-Sandino* stands for the proposition that an

OSC ends all periods of physical presence and that no further period may accrue.

In *Matter of Nolasco*, the Board ruled that section 202 of the NACARA amended section 309(c)(5) of the IIRIRA so that the provisions of section 240A(d) of the INA, 8 USC §1229b(d) applied to Orders to Show Cause issued on, before or after the enactment of the IIRIRA. This issue is not relevant to this case.

In the instant case, the Board, again relying upon *Matter of Nolasco*, determined that the issuance of the OSC to Mr. Patel on April 6, 1990 ended the period of continuous physical presence begun by Mr. Patel in September 1989–short of the seven years required by INA sec. 244. However, the Board did not even discuss the accumulation of seven years's continuous physical presence acquired by Mr. Patel *after* the issuance of the OSC. In fact, seven years continuous physical presence had been acquired by Mr. Patel after the decision of the Immigration Judge on December 10, 1992 and before the Board's decision on December 14, 1999.

At the time of the Board's decision in Mr. Patel's case, Mr. Patel had been present in the United States for nearly 10 years after the issuance of the OSC, had made a prima facie showing of good moral character during the seven year period immediately preceding the Board's decision, and had made a prima facie showing of extreme hardship to himself and U.S. citizen child. In spite of all this, the Board did not discuss this renewed period of physical presence. It simply held that he was not statutorily eligible pursuant to *Matter of Nolasco*. The Board also made no "good moral character" determination of Mr. Patel for the seven year period immedi-

ately preceding its decision.[1] Finally, the Board did not decide that he failed to merit suspension of deportation as a matter of discretion. A correct reading of the Immigration and Nationality Act compels remanding this case to the Board to at least consider whether or not Mr. Patel merits suspension of deportation under INA § 244. To have done otherwise was an abuse of discretion by the Board.

At the time of filing this Petition for Review in the Eighth Circuit, the only opinion the Board of Immigration Appeals had rendered on the subject of whether an alien could accrue a subsequent qualifying period of continuous physical presence for suspension of deportation purposes was an unpublished decision, *In re* _____, File A28 753 481, August 10, 1999 (Vacca)[2] In that decision, Board Member Vacca noted that *Matter of Nolasco* caused the respondent's period of continuous

---

[1] Although the Board stated that Mr. Patel gave fraudulent testimony at his hearing dated December 10, 1992, and that this barred a finding of good moral character, this assertion does not result from any finding of fraud by the Immigration Judge from whom this case was appealed to the BIA. Instead, the Board relies upon a letter written to the INS on a different, though related, matter by a former counsel of Mr. Patel. First, this is not to be construed as any such admission by Mr. Patel; the statements made by his counsel in correspondence to the INS, not to the Immigration Court, are hearsay and cannot support a particularized finding of fraud. Second, even assuming that said letter may be so used, the latest date of fraudulent testimony was December 10, 1992. Thus, Mr. Patel can show good moral character for the seven year period immediately preceding the Board's refusal to remand his case for decision of his suspension of deportation application on the merits, as required by INA sec. 244.

[2] Due to the fact that this decision is unpublished, pagination herein is given as reproduced in the appendix to this petition.

physical presence to end at the issuance of the OSC. However, the respondent in that case has accrued an *additional* period of physical presence after the OSC was issued. Member Vacca then stated:

> ...while the occurrence of an event specified in section 240(d)(1) of the Act (INA) ends "any period" of continuous physical presence preceding the event, the statute does not explicitly preclude the initiation of another period continuous physical presence for purposes of relief...Accordingly, we will remand the record to the Immigration Judge for consideration of the respondent's application for suspension of deportation.

In re _____, pp. A-2 (appendix pagination) (citations omitted).

However, after the filing of the instant Petition for Review, the Board reversed course and issued a published decision deciding exactly the opposite of Member Vacca's August 1999 decision. In *In re Mendoza-Sandino*, Int. Dec. 3426 (BIA 2000), 2000 WL 225840 (BIA), the Board held that service of an Order to Show Cause and Notice of Hearing (OSC) not only terminates the period of physical presence accrued to that point, but also precludes the accrual of a subsequent period of physical presence for suspension of deportation eligibility. As Board Member Guendelsberger stated in dissent, "Such a broad reading of section 240A(d)(1) [of the INA] is not supported by either the wording or the legislative history of that provision." *In re Mendoza-Sandino, id* at _____. (Guendelsberger, dissenting).

The dissent correctly points out that the starting point for a correct understanding of section 240A(d)(1)

is the statutory language itself. Section 240A(d)(1) of the INA, 8 U.S.C. §1229b (d)(1), states as follows:

> TERMINATION OF CONTINUOUS PERIOD.–For purposes of this section, **any period** of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a)(2) that renders an alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.

(Emphasis added).

The statement that "any period" of continuous physical presence ends upon service of the notice to appear[3] strongly suggests the conclusion that there may be more than one period of continuous physical presence that may be accrued. Section 240A(d) clearly terminates the period accruing prior to the OSC, but is silent concerning physical presence acquired after the OSC. The reference to ending "any period" of physical presence at least suggests that another period of physical presence then ensues. *Id.* at _____ .

The Ninth Circuit acknowledged this interpretation of section 240A(d)(1) in the case of *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998). In that case the court held that an alien should have been granted a motion to reopen in order to grant suspension of deportation. Although the case was decided on other grounds, the Ninth Circuit

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[3] Again, through the NACARA, "notice to appear" comprehends OSCs issued on, before or after the effective date of the IIRIRA.

did note that an alien can satisfy the requisite period of continuous physical presence, even under the new test, "by virtue of the fact that she has accrued (seven or more) years of physical presence *since* the INS issued her an order to show cause." *Id* At 434, n.2 (Emphasis in original).

Even the common dictionary meaning of "any" supports Petitioner's reading of the statute. "Any" does not mean "all" or "every". "Any instead means "one or some, regardless, of sort, quantity or number, one or another selected at random". *Webster's II New Riverside University Dictionary* 93 (1984). See *In re Mendoza-Sandino*, *supra* at _____ (Villageliu, dissenting). "Any period" of physical presence ended by an OSC does not mean "all" or "every" period is ended. There can be further periods.

Furthermore, under section 244, there are two different periods of time needed to show eligibility for suspension of deportation. INA §244(a)(1), under which Mr. Patel qualifies, requires seven years; however, INA §244(a)(2), which covers certain criminal aliens, requires ten years. INA §244, 8 §1254 (1990). Under former law, after the conviction of a crime covered in section 244(a)(2), ten additional years of continuous physical presence was required to qualify. *Matter of Lozada*, 19 I&N Dec. 637(BIA). Time accrued before conviction could not count. If periods of continuous physical presence following conviction are not allowed, then *no §244(a)(2) application could ever be approved*– the commission of the very crime which places the applicant under the necessity of accruing ten more years of presence would bar the applicant from ever starting to accrue it, under the view held by the BIA in *In re Mendoza-Sandino*, Int. Dec. 3426 (BIA 2000). This is clearly an absurd result.

Moreover, the INA has historically recognized that there can be different and succeeding periods of physical presence for purposes of suspension of deportation. "Thus the resetting of the physical presence clock upon the occurrence of particular events has been and remains inherent in the eligibility provisions for suspension of deportation." *Id.* at ___ (Guendelsberger, dissenting).

Had Congress intended the issuance of an OSC to bar all future eligibility for relief and to preclude the possibility of accruing physical presence, it would have clearly stated that issuance of an OSC prior to accruing seven years of presence makes one ineligible for suspension. Instead, the special rules relating to continuous physical presence are set forth in a separate provision. This should lead this Court to recognize that while an OSC can break continuity of physical presence, it does not preclude an alien from ever again accruing the necessary period of time. *Id.* at ___ (Guendelsberger, dissenting).

Because the statutory language of section 240A((d)(1) of the INA is unambiguous, it compels reversal of the BIA's holding in *In re Mendoza-Sandino*. But, even were such language ambiguous, the Supreme Court must resolve ambiguity in the immigration statutes in favor of the alien. *INS v. Errico,* 385 U.S. 214, 225 (1966); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). Deportation is such a severe penalty that the Court must read relevant statutes as narrowly as possible.

Finally, as dissenting Member Villageliu states in *Mendoza-Sandino, supra* at , the BIA's decision mistakenly assumes that no deportation proceeding may ever

be won by the alien.[4] That is, if an alien in proceedings prevails on the issue of deportability and proceedings are terminated, that alien can never again accrue any period of physical presence or residence under the holding of the BIA. *Id.* at 11 (Villageliu, dissenting). This would be true even if the Immigration Judge finds that proceedings should never have been instituted in the first place. This makes no sense.

CONCLUSION

This Court should thus conclude that the BIA's decision in *Mendoza-Sandino* is erroneous and cannot be followed. First, the most logical reading of the statute supports Mr. Patel's position–that he may accrue continuous physical presence after the issuance of an OSC. At the very least, if the statutory language can be said to be ambiguous, any ambiguity must be resolved in favor of the alien. This Court reviews the BIA's findings and the Eighth Circuit's findings of law *de novo*. Petitioner prays that this Court reverse the decisions of the Eighth Circuit Court of Appeals and the BIA, hold that a period of continuous physical presence may be accrued after issuance of an order to show cause, that Petitioner accrued such seven years of continuous physical presence, and remand this matter to the BIA for further proceedings consistent therewith and for such other and further relief as this Court deems just and proper.

---

[4] Another dissenting Member, Chairman Schmidt, noted that it is not always the fault of the aliens that deportation proceeding can suffer incredible delays. They have no control over administration decision-making, and cannot be faulted for exercising their rights of appeal. *Id* at 13 (Schmidt, dissenting).

Respectfully submitted,

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APPENDIX A

BIA decision on continuous physical presence

Decision of the Board of Immigration Appeals

U.S. Department or Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A28 753 481 - Boston

Date: August 10, 1999

In re:

IN DEPORTATION PROCEEDINGS

APPEAL
ON BEHALF OF RESPONDENT:
Howard A. Silverman, Esquire

CHARGE:
Order: Sec. 241 (a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] -
Entered without inspection

APPLICATION:
Suspension of deportation

The respondent has appealed from the Immigration Judge's March 26, 1997, decision pretermitting his application for suspension of deportation under section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a). The record will remanded to the Immigration Judge for further proceedings.

The record reflects that the respondent entered the United States on July 19, 1987, and was served with an Order to Show Cause and Notice of Hearing (Form I-22 1) the next day. In her decision, the Immigration Judge found that as the respondent was served with the Order to Show Cause prior to his acquisition of 7 years of continuous physical presence, he was statutorily ineligible for suspension of deportation.

Recently, in *Matter of Nolasco,* Interim Decision 3385 (BIA 1999), this Board concluded that the **stop-time** rule of section 240A(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(d), generally applies to all pending applications for suspension of deportation. See section 203(a) the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105 100, 111 Stat. 2193, 2196 (1997), *amended by* Pub. L. No. 105-139, 111 Stat. 2644 (1997) ("NACARA"). However, unlike the alien in *Matter of Nolasco, supra*, the respondent before us appears to have accrued over 7 years of continuous physical presence following the service of the Order to Show Cause. As the respondent argues on appeal, while the occurrence of an event specified in section 240(d)(1) of the Act ends "any period" of continuous physical presence preceding the event, the statute does not explicitly preclude the initiation of another period of continuous physical presence for purposes of relief. See *Arrozal v. INS,* 159 F.3d 429, 434 n.2 (9th Cir. 1998); *Matter of Nolasco, supra,* at 14-15 (Rosenberg, concurring). Accordingly, we will remand the record to the Immigration Judge for consideration of the respondent's application for suspension of deportation.

ORDER: The record is remanded, to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

/s/ Fred W. Vacca
FOR THE BOARD

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APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision Of The Board of Immigration Appeals

Date: Dec 4, 1999

File: A28 490 861 - St. Louis

In re: GOVINBDHAI MANILAL PATEL

IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION ON BEHALF OF RESPONDENT:
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Joseph R. Dierkes, General Attorney

CHARGE:
Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - Entered without inspection

Lodged: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)]- Nonimmigrant - remained longer than permitted

APPLICATION:
Asylum; withholding of deportation; suspension of deportation

The respondent's appeal from the denial of his application for asylum and withholding of deportation will be dismissed. The Immigration Judge's decision accurately sets forth the facts asserted by the respondent in support of his claim for asylum and withholding of deportation, applies the appropriate legal standards, and correctly concludes that the respondent failed to establish persecution or a well-founded fear of persecution on account of one of the five grounds enumerated in section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42). In addition, the respondent's motion to remand his case to the Immigration Judge will be denied because he failed to show that he is prima facie eligible for the relief he seeks.

The respondent bears the evidentiary burdens of proof and persuasion in any application for asylum or withholding of deportation. *Matter of B-*, Interim Decision 3251, at 6 (BIA 1995). An applicant for asylum must establish that he meets the "refugee" definition of section 101(a)(42)(A) of the Act. Specifically, he must be "unable or unwilling to return to, and . . . unable or unwilling to avail himself . . . of the protection of his country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 101(a)(42)(A) of the Act; *Matter of S-P-*, Interim Decision 3287 (BIA 1996); 8 C.F.R. § 208.13. In meeting this burden, an asylum applicant must do more than simply show that he was harmed or has a well-founded fear of being harmed. An applicant must demonstrate that the harm was or would be inflicted "on account of race, religion, nationality, membership in a particular social group, or political opinion." *Matter of S-P-, supra*; 8 C.F.R. § 208.13. An applicant for

asylum has established a well-founded fear of persecution if he shows that a reasonable person in his circumstances would fear persecution. *Id.* We agree with the Immigration Judge's conclusion that the respondent failed to meet his burden of proof.

The Immigration Judge also found that the respondent's claim lacked credibility (I.J. at 9). We agree. As the Immigration Judge pointed out, the respondent's answers to the questions posed at the hearing were often evasive and vague. For example, although the respondent claimed to be a leader of the local chapter of the Bhartiya Janta Party (BJP), he was unable to say exactly how or when he rose to that post (Tr. at 75, 115-16). He was also unable to specify the number of beatings he allegedly received in India or tell generally when they occurred (Tr. at 79). Likewise, he was unable to tell when, or how many times, he was allegedly jailed while in India (Tr. at 81-82). The record also reflects inconsistencies between the respondent's application for asylum and his testimony. For example, although his written application for asylum indicates that his wife is still in India, he testified that she came here with him, and that he doesn't know where she is (Exh. 6; Tr. at 13, 66, 70, 105, 107). Our review of the record reveals that (1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the respondent provided incredible testimony; and (3) a convincing explanation for the discrepancies and omissions has not been supplied by the respondent. For these reasons, the Board defers to the Immigration Judge's adverse credibility finding. *Matter of A-S-*, Interim Decision 3336, at 5-7 (BIA 1998); *see also Matter of Y-B-*, Interim Decision

3337, at 4-5 (BIA 1998) (noting that specific, detailed, and credible testimony or a combination of detailed testimony and corroborative background evidence is necessary to prove a case for asylum).

We also note that the respondent's veracity is further damaged by the fact that he filed a fraudulent application for suspension of deportation (Opposition to Motion to Remand, Exh. B). Also, in a May 18, 1996, reply to a Notice of Intent to Revoke a visa petition approval, the respondent's prior attorney admitted that information previously provided by the respondent, including testimony he provided on December 10, 1992, was false (Opposition to Motion to Remand, Exhs. A and B). This letter expressly admits that the respondent misrepresented facts to Immigration officials and that he fabricated 90% of his earlier application for suspension of deportation. We find that this information further diminishes the respondent's credibility and provides a basis for us to have denied his application for asylum in the exercise of discretion.

We also agree with the Immigration Judge's finding that the lack of corroborative evidence diminishes the respondent's claim. *See Matter of S-M-J-*, Interim Decision 3303, at 4 (BIA 1997) (noting that because the burden of proof is on the alien, he or she should provide supporting evidence, if available, both of general country conditions and of the specific facts sought to be relied on, or explain its unavailability); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989). For example, the respondent provided no corroborative evidence regarding his membership in the BJP. In addition, no letters or affidavits from his family or friends were submitted to support his claim. Because the respondent submitted "a sterile application without supporting documents except for

his self-serving statements," the Immigration Judge found that there was insufficient documentary evidence to support his claim. With this evidentiary void in the record, we agree with the Immigration Judge that the respondent failed to meet his burden of proof. *See Matter of M-D-*, Interim Decision 3339 (BIA 1998) (finding that the alien failed to meet his burden of proof where there was a complete lack of evidence to corroborate the specifics of his asylum claim).

Finally, we note that the respondent allegedly fears persecution because he is a Hindu and a member of the BJP. We take administrative notice of the fact that since the time of the respondent's departure from India, the BJP became the dominant and ruling party in India.[1] We also note that the coalition government led by the BJP has now dissolved. However, the fact that the respondent's own party was able to rise to power significantly diminishes the legitimacy of his claim that he fears he will be persecuted on account of that membership if he returns to India. We also find that the reasonableness of the respondent's fear is diminished by the fact that his family has apparently remained unharmed in India since his departure. *See Matter of A-E-M-*, Interim Decision 3338 (BIA 1998) (noting that the reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure). For these reasons, because we are in agreement with the decision of the Immigration Judge, and because we are not persuaded by any of the respondent's arguments on appeal, the appeal will be dismissed.

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[1] The Board can take administrative notice of recent or changed country conditions. *Matter of S-M-J-*, *supra,* at 9, n.2 (BIA 1997).

The respondent has also filed a motion to remand his pending appeal to the Immigration Judge for consideration of his application for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1). Suspension of deportation requires, among other things, a period of 7 years continuous physical presence in the United States. In *Matter of Nolasco*, Interim Decision 3385 (BIA 1999); we determined that, with certain exceptions not relevant in this case, the provision for calculating continuous physical presence in section 240A(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(d) (Supp. 11 1996) (the "stop time rule"), applies to applications for suspension of deportation. Therefore, the respondent's period of continuous physical presence ended at the service of the Order to Show Cause (OSC). The respondent claims to have been physically present in the United States since September 8, 1989, and an OSC was served in the respondent's case on April 6, 1990. Because the OSC was served before the respondent acquired 7 years of physical presence in the United States, the respondent cannot meet the physical presence requirement for suspension of deportation. *Matter of Nolasco, supra.*

As noted above, the respondent previously gave false testimony while seeking an immigration benefit, and he filed a fraudulent application for suspension of deportation. We find that this conduct bars the respondent from establishing good moral character, a requirement for suspension of deportation. *See Matter of R-S-J-*, Interim Decision 3401 (BIA 1999) (noting that for purposes of section 101(f)(6) of the Act, false oral statements under oath to an asylum officer can constitute false testimony); section 101(f)(6) of the Act (stating that no person can be found to have good moral character if he

or she gives false testimony for the purpose of obtaining a benefit under the Act). For these reasons, the respondent's motion to remand will be denied because he failed to establish a prima facie showing that he is entitled to the relief he seeks. *Matter of Gutierrez*, Interim Decision 3286 at 6 (BIA 1996) (noting that "an alien must establish prima facie eligibility for the relief sought before a motion to reopen will be granted"); *see also Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992). For these reasons, the following orders shall be issued.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

/s/ Edward R. Gats
FOR THE BOARD

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-1131

Govindbhai M. Patel,
Petitioner,
v.
Immigration and Naturalization Service;
Michael Heston, District Director of the United States Immigration and Naturalization Service;
Janet Reno, Attorney General of the United States,
Respondents.

On Petition for Review from
Immigration and Naturalization Service.
[UNPUBLISHED]

Submitted: November 15, 2000
Filed: November 22, 2000

Before BOWMAN, FAGG, and BEAM,
Circuit Judges.

PER CURIAM.

Govindbhai M. Patel, a citizen of India, entered the United States on September 9, 1989, as a nonimmigrant visitor for pleasure. Although he was authorized to remain in the United States only until March 7, 1990, Patel did not leave. Seven months later, on April 6, 1990, the Immigration and Naturalization Service (INS) issued Patel an order to show cause charging him with

deportability. Seeking to extend his stay, Patel applied for asylum, and an immigration judge denied Patel's application in December 1992. While Patel's appeal was pending, he obtained a work visa by providing false information to the INS. Patel then filed a motion to remand with the Board of Immigration Appeals (BIA) seeking to adjust his status on the basis of his work visa. In reviewing his file, the INS found many discrepancies and concluded Patel had submitted false information.

After accruing seven years of continuous physical presence in the United States, Patel filed a motion to reopen with the BIA seeking suspension of deportation under 8 U.S.C. § 1254(a)(1) (1994), which gives the Attorney General discretion to suspend deportation of an alien who

> has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship.

On September 30, 1996, Congress repealed this provision, replaced it with more limited discretionary relief, and enacted a "stop-time" rule providing that any period of physical presence shall be deemed to end when the alien is served an order to show cause. *See* 8 U.S.C. § 1229b(d)(1)(Supp. III 1997). Congress also provided the stop-time rule applies to orders to show cause issued before the rule's enactment. *See id.* § 1101 note; *Afolayan v. I.N.S.*, 219 F.3d 784, 788 (8th Cir. 2000). We recently held the stop-time rule applies in suspension of deportation proceedings when an order to show cause was

issued before the rule was enacted. *See Afolayan,* 219 F.3d at 788; *Tang v. I.N.S.*, 223 F.3d 713, 719 (8th Cir. 2000).

The Board denied Patel's appeals and dismissed his motions because Patel had not acquired seven years of continuous physical presence before the issuance of the order to show cause, and because Patel could not establish he was a person of good moral character given his false testimony during his asylum hearing and fraudulent application for a work visa. Patel now seeks review of the order denying suspension of deportation under § 1254(a)(1).

Patel argues he qualifies for suspension of deportation because he showed more than seven years' continuous physical presence, good moral character, and extreme hardship. According to Patel, even if the stop-time rule applies to him, he accumulated seven years of physical presence after issuance of the order to show cause. Patel also argues retroactive application of the stop-time rule to him violates his Fifth Amendment right to due process. Patel's arguments involving physical presence and the stop-time rule are foreclosed by our recent decisions in *Afolayan*, 219 F.3d at 788-89, and *Tang*, 223 F.3d at 719. *Accord Angel-Ramos v. Reno*, No. 99-3126, 2000 WL 1346860, at *4-5 (7th Cir. Sept. 29, 2000); *Ayoub v. I.N.S.*, 222 F.3d 214, 215 (5th Cir. 2000) (per curiam); *Rivera-Jimenez v. I.N.S.,* 214 F.3d 1213, 1217 (10th Cir. 2000) (per curiam); *Appiah v. I.N.S.*, 202 F.3d 704, 708-09 (4th Cir.), *cert. denied*, 2000 WL 840068 (U.S. Oct. 2, 2000) (No. 99-10039); *Tefel v. Reno*, 180 F.3d 1286, 1293, 1299-1302 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 2657 (2000). Regardless of the stop-time rule's application, Patel's false testimony before the INS in 1992 precludes him from showing good moral charac-

ter necessary to qualify for suspension of deportation. *See* 8 U.S.C. § 1105a(f)(6) (person who gives false testimony to obtain benefits under immigration law is not of good moral character).

Because Patel lacks the seven years of physical presence and the good moral character needed to qualify for suspension of deportation, we deny Patel's petition for review, and affirm the BIA's decision.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-1131

Govindbhai M. Patel,
Petitioner,
v.
Immigration and Naturalization Service,
Michael Heston, District Director of the United States Immigration and Naturalization Service,
Janet Reno, Attorney General of the United States,
Respondents.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for reheating en banc is denied. The petition for reheating by the panel is also denied.

(5128 -010199)

February 15, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit

Supreme Court, U.S.
FILED
AUG 15 200

No. 00-1715

In the Supreme Court of the United States

GOVINDBHAI M. PATEL, PETITIONER

v.

MICHAEL HESTON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is statutorily ineligible for the discretionary relief of suspension of deportation under 8 U.S.C. 1254(a)(1) (1994) because he was statutorily precluded from accruing the requisite seven-year period of continuous physical presence in the United States after the Immigration and Naturalization Service served him with an Order to Show Cause commencing his deportation proceeding.

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In the Supreme Court of the United States

No. 00-1715

GOVINDBHAI M. PATEL, PETITIONER

v.

MICHAEL HESTON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A11-A14) is unpublished, but the decision is noted at 242 F.3d 376 (Table). The opinion of the Board of Immigration Appeals (Pet. App. A4-A10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2000. A petition for rehearing was denied on February 15, 2001 (Pet. App. A15). The petition for a writ of certiorari was filed on May 15,

2001. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 9, 1989, petitioner entered the United States as a non-immigrant visitor for pleasure. Certified Administrative Record (C.A.R.) 443. Petitioner was authorized to remain in the United States only until March 7, 1990, but he remained here past that date. *Ibid.* On April 6, 1990, the Immigration and Naturalization Service (INS) served on petitioner an Order to Show Cause (OSC), charging petitioner with deportability under then-Section 241(a)(2) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2) (Supp. II 1990), as a non-immigrant who remained in the United States longer than permitted. C.A.R. 443-444. At the time that the INS served the OSC, petitioner had been in the United States for seven months.

In his deportation proceedings, petitioner initially applied for asylum and withholding of deportation. C.A.R. 370-375. On December 10, 1992, the immigration judge (IJ) denied petitioner's applications, finding among other things that petitioner had presented false testimony in support of his applications, and concluding that petitioner had failed to satisfy his burden of proving his eligibility for the relief sought. C.A.R. 201. The IJ granted petitioner voluntary departure, and in the alternative ordered petitioner deported to India. C.A.R. 200.

2. Petitioner appealed from the IJ's decision to the Board of Immigration Appeals (BIA). On January 29, 1997, petitioner filed with the BIA a motion to remand the case to the IJ so that he could apply for the discretionary relief of suspension of deportation under then-Section 244(a)(1) of the INA, 8 U.S.C. 1254(a)(1) (1994).

See C.A.R. 23-59. Under INA Section 244(a)(1), the Attorney General had the authority to suspend the deportation of an alien who (as pertinent here) had been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his application for suspension, who proved that during all of that period he was a person of good moral character, and whose deportation would result in extreme hardship to the alien or to his citizen or lawful permanent resident alien spouse, parent, or child. See 8 U.S.C. 1254(a)(1) (1994). By the time petitioner filed that motion to remand with the BIA, he had been in the United States for seven years.

The INS opposed petitioner's motion to remand, on two grounds pertinent here. First, during the pendency of petitioner's appeal to the BIA, the INS had learned (and both petitioner and his attorney had conceded) that petitioner had provided false information in an application for employment certification and had testified falsely before the IJ on a prior application for suspension of deportation. That fraudulent conduct, the INS argued, precluded petitioner from establishing that he had the good moral character requisite for suspension of deportation. See C.A.R. 116-118, 127-128, 130.

Second, the INS argued that petitioner was precluded from establishing the requisite seven years' continuous physical presence in the United States by the new Section 240A(d) of the INA, 8 U.S.C. 1229b(d) (Supp. V 1999), which was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. That new Section 240A(d) provides that "any period of continuous residence or continuous physical presence in the United States shall be deemed to end

when the alien is served a notice to appear" commencing removal proceedings. 8 U.S.C. 122b(d)(1) (Supp. V 1999). A transitional provision of IIRIRA made that new "stop-time" rule applicable to Orders to Show Cause served on aliens and commencing deportation proceedings under pre-IIRIRA law. See IIRIRA § 309(c)(5), 110 Stat. 3009-627; see also Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, § 203(1), 111 Stat. 2196 (clarifying temporal scope of IIRIRA Section 309(c)(5) as reaching pre-IIRIRA OSCs). Thus, the INS argued, petitioner's statutory period of continuous physical presence ended on the date he was served with the OSC, and petitioner could not establish the requisite seven years' continuous physical presence because the OSC was served on him before he had been physically present here for seven years. See C.A.R. 4.

3. In an order issued on December 14, 1997, the Board of Immigration Appeals affirmed the IJ's decision denying asylum and withholding of deportation, and denied petitioner's motion to remand. Pet. App. A4-A10. First, the BIA agreed with the INS that, under the new stop-time rule added by IIRIRA, petitioner could not establish the seven years' continuous physical presence requisite for suspension of deportation, because his period of physical presence terminated when he was served with the OSC in 1990. *Id.* at A9. In reaching that conclusion, the BIA relied (*ibid.*) on its decision in *In re Nolasco-Tofino*, Interim Dec. No. 3385, 1999 WL 218466 (Apr. 15, 1999), which held that the new stop-time rule applies to applications for suspension of deportation. The BIA's decision in *Nolasco-Tofino*, however, did not expressly address whether an alien could accrue seven years' physical presence *after* the OSC was served.

Second, the BIA alternatively concluded that petitioner could not establish the good moral character necessary for suspension of deportation. In particular, it stated that petitioner "previously gave false testimony while seeking an immigration benefit, and he filed a fraudulent application for suspension of deportation." Pet. App. A9. That conduct, the BIA ruled, "bars [petitioner] from establishing good moral character, a requirement for suspension of deportation." *Ibid.*

4. Petitioner filed a petition for review of his deportation order in the court of appeals. Petitioner argued that, even if he had not accrued the requisite seven years' continuous physical presence before he was served with the OSC in 1990, he had accrued a new period of seven years' continuous physical presence after he was served with that OSC, which made him eligible for suspension of deportation. Petitioner urged the court to reject the BIA's decision in *In re Mendoza-Sandino*, Interim Dec. No. 3426, 2000 WL 225840 (Feb. 23, 2000), issued after the BIA's decision in this case, in which the BIA definitively ruled that the service of an OSC or a notice to appear not only terminates the period of continuous physical presence accrued to that point, but also precludes the accrual of a new seven-year period of physical presence after that point for purposes of proving suspension eligibility.

The court of appeals, in an unpublished decision, rejected petitioner's contentions and denied his petition for review. Pet. App. A11-A14. First, the court held (*id.* at A13) that petitioner's argument that he had accrued a qualifying period of seven years' continuous physical presence after the issuance of his OSC was foreclosed by its decisions in *Afolayan* v. *INS*, 219 F.3d 784, 788-789 (8th Cir. 2000), and *Tang* v. *INS*, 223 F.3d 713, 719 (8th Cir. 2000). Second, the court held that,

regardless of the stop-time rule, petitioner was foreclosed from obtaining suspension of deportation by the BIA's determination that petitioner lacked the requisite good moral character. Pet. App. A13-A14.

ARGUMENT

Petitioner argues that the BIA and the court of appeals erred in concluding that he was barred from eligibility for suspension of deportation by the new stop-time rule enacted in IIRIRA, which provides that any period of continuous physical presence necessary for discretionary relief from deportation ends when the OSC commencing deportation proceedings (or the notice to appear commencing removal proceedings, after IIRIRA) is served on the alien. Petitioner maintains that, because he was in the United States for seven years after he was served with the OSC, he accrued the necessary period of continuous physical presence under the statute. The court of appeals properly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Furthermore, this case would not present a suitable vehicle for resolution of that issue in any event, because both the BIA and the court of appeals determined that petitioner could not be granted suspension of deportation on another, independent basis. Further review is therefore not warranted.

1. To obtain the discretionary relief of suspension of deportation under former INA Section 244(a)(1), 8 U.S.C. 1254(a)(1) (1994), an alien was required to show, at a minimum, that he had accrued seven years' continuous physical presence in the United States, that he was a person of good moral character during that period, and that his deportation would result in extreme hardship to one of certain persons identified in

the statute. Petitioner cannot establish entitlement to suspension of deportation because, as the BIA ruled, he cannot show that he was a person of good moral character (even assuming that he could show that he had accrued a qualifying period of seven years' continuous physical presence after the OSC was served). The BIA found that petitioner had filed a fraudulent application for suspension of deportation. Pet. App. A9. That finding is plainly sufficient to support the BIA's determination that petitioner could not establish his good moral character, and thus cannot establish entitlement to suspension of deportation. And because petitioner cannot make that showing, this case would not present a suitable vehicle for this Court to determine whether petitioner could accrue seven years' continuous physical presence in the United States necessary for suspension of deportation after he was served with the OSC. The BIA's finding that he lacked good moral character constitutes an independent basis for denial of suspension of deportation.

Petitioner argues (Pet. 11 n.1) that this Court should disregard the BIA's adverse finding on the good moral character issue because that determination was based on a letter written to the INS by petitioner's former attorney, and should not be construed as an admission by petitioner. The letter, however, simply recapitulated admissions about false statements that petitioner had made in another proceeding before the INS, see C.A.R. 117, 127, and petitioner is bound by the actions of his counsel, see *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 92 (1990). Petitioner also notes (Pet. 11 n.1) that the false testimony on which the BIA relied to conclude that he lacked good moral character was given on December 10, 1992, seven years and four days before the BIA denied his motion to remand, see

p. 3-4, *supra*. Thus, petitioner argues, the BIA was not precluded by the fact of that false testimony from concluding that he had good moral character during the seven years preceding any grant of suspension of deportation (see 8 U.S.C. 1254(a)(1) (1994)). But petitioner did not thereafter move to purge the record of his false testimony in support of his application. Thus, petitioner can scarcely contend that the BIA abused its discretion in relying on that fraudulent testimony to conclude that his lack of good moral character continued for at least some period of time into the seven-year period preceding its denial of his motion to remand.

2. The court of appeals correctly ruled that petitioner could not establish seven years' continuous physical presence in the United States after service of the OSC. As the BIA concluded in *Mendoza-Sandino*, once the period of an alien's continuous physical presence has been stopped by an event identified in INA Section 240A(d)(1), such as the service of an OSC, it cannot be commenced anew. Relying on the legislative history of IIRIRA, the BIA noted in particular that Congress intended the new stop-time rule to eliminate an aspect of pre-IIRIRA law that created an incentive for aliens to cause delays in their deportation proceedings. Under pre-IIRIRA law, the time that an alien spent in deportation proceedings before issuance of a final order could be counted towards the necessary seven years. See *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981). Thus, aliens had an incentive to prolong their deportation proceedings until that seven-year period had accrued. See H.R. Rep. No. 469(I), 104th Cong., 2d Sess. 390 (1996). Permitting an alien to accrue a new period of seven years' presence after the OSC was served, the BIA concluded, would open up a new avenue for similar abuse, and would thus be con-

trary to Congress's clear intent in enacting the stop-time rule.

Every court of appeals that has addressed that issue has upheld the BIA's application of the stop-time rule in *Mendoza-Sandino*. See *Ram* v. *INS*, 243 F.3d 510, 517-518 (9th Cir. 2001); *McBride* v. *INS*, 238 F.3d 371, 375-377 (5th Cir. 2001); *Afolayan* v. *INS*, 219 F.3d 784, 788 (8th Cir. 2000). As the Ninth Circuit observed in *Ram*, "Congress enacted the stop-time rule in response to a belief that aliens sought to delay deportation proceedings in order to meet the continuous physical presence requirement," and "[a]llowing the clock to restart [after the issuance of the OSC] would permit an end-run around Congress' intent." 243 F.3d at 518; see also *McBride*, 238 F.3d at 377 ("Congress has expressed a desire to reduce the time that an alien can prolong his stay following issuance of a deportation order, a goal clearly furthered by the BIA's interpretation of the stop-time rule.").

Petitioner argues that the court of appeals' decision in this case conflicts with language in *Arrozal* v. *INS*, 159 F.3d 429, 434 n.2 (9th Cir. 1998). In that case, the Ninth Circuit noted, in a footnote to an opinion that vacated on other grounds the BIA's decision not to grant the alien's motion to reopen her deportation proceeding so that she might apply for suspension of deportation, that the alien "might satisfy the continuous physical presence requirement by virtue of the fact that she has accrued twelve years of continuous physical presence *since* the INS issued her an order to show cause." *Ibid.* That observation in the footnote was dictum, however, and has been superseded by the Ninth Circuit's subsequent decision in *Ram*, which

squarely addressed the issue presented here and decided it adversely to petitioner's position.[1]

Petitioner also argues (Pet. 14) that the BIA's application of the stop-time rule would lead to absurd results in certain circumstances, such as applications for suspension of deportation under old INA Section 244(a)(2) filed by criminal aliens deportable under former 8 U.S.C. 1251(a)(2) (1994). Petitioner points out that suspension of deportation under old Section 244(a)(2), 8 U.S.C. 1254(a)(2) (1994), required ten years' continuous physical presence in the United States *following* commission of the criminal act or conviction of a crime rendering the alien deportable; but since the stop-time rule of IIRIRA provides that the pertinent period of physical presence terminates when the alien commits the criminal offense that renders him removable, see 8 U.S.C. 1229b(d)(1) (Supp. V 1999), the result would be that, after IIRIRA, no criminal alien who was deportable under former Section 1251(a)(2) could receive suspension of deportation.

Contrary to petitioner's submission, however, it is not an absurd result that IIRIRA may have made many criminal aliens effectively ineligible for suspension of deportation. Throughout IIRIRA, Congress expressed

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[1] Petitioner observes (Pet. 11-12) that a panel of the BIA, citing that footnote in *Arrozal*, at one point concluded that the stop-time rule did not "explicitly preclude the initiation of another period of continuous physical presence for purposes of relief." See Pet. App. A2. Subsequently, however, the en banc BIA considered the matter more thoroughly and concluded that an alien may not accrue a new period of physical presence after the OSC has been served. The mere fact that the BIA reconsidered the issue and arrived at a different decision does not suggest that its more recent reading is not entitled to deference. See *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996).

an intent that criminal aliens be denied discretionary relief from removal and be removed from the United States as expeditiously as possible. Thus, Congress prospectively repealed suspension of deportation altogether in IIRIRA, and replaced it with cancellation of removal, in 8 U.S.C. 1229b (Supp. V 1999). Especially for aliens such as petitioner who have not been admitted to legal permanent residence, it will be the very rare occasion on which an alien convicted of a criminal offense may receive cancellation of removal. Under IIRIRA, any alien who is not a legal permanent resident and who has been convicted of one of the various criminal offenses that constitute grounds for removal may not receive cancellation of removal. See 8 U.S.C. 1229b(b)(1)(C) (Supp. V 1999). Thus, it is not all peculiar that, for transitional deportation proceedings that were commenced before IIRIRA was enacted but were still pending on that date, Congress would have taken a similarly strict approach to suspension of deportation for aliens who are deportable based on criminal convictions.[2]

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[2] Moreover, depending on the circumstances, an alien who had been admitted to lawful permanent residence but who was deportable based on a criminal conviction entered before IIRIRA took effect might remain eligible for discretionary relief under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994). See 66 Fed. Reg. 6436 (2001); see also *INS* v. *St. Cyr*, 121 S. Ct. 2271, 2276 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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